IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1704

W. E. CAMPBELL, Superintendent of Public Instruction of the Commonwealth of Virginia, and THE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA,

Appellants,

—v.—

DANIEL J. KRUSE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION TO DISMISS OR AFFIRM

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Appellees, pursuant to Rules of the Supreme Court of the United States, move the Court to dismiss the appeal herein as to appellant Board of Education of the Commonwealth of Virginia on the ground that

such appellant is not a party to this case. Alternatively, appellees, pursuant to Rule 16, move that the Decree and Order of the District Court be affirmed on the grounds that the question is so unsubstantial, and the decision below so plainly correct, as not to warrant further review.

STATEMENT OF THE CASE

This is a direct appeal from the decree and order entered on March 23, 1977, by a District Court of three judges. Jurisdictional statement, App. 1-4 (hereafter J.S. App.).

Appellees[1] challenged the provisions of Virginia Code Section 22-10.8(a) and the practice of the state's welfare departments, which deny to the handicapped children of poor parents the ability to obtain an appropriate education, when such is unavailable in the public schools, except if the parents give legal custody of their children to a local welfare department.

During school year 1975-1976, there were 36,434 handicapped children in Virginia who received no appropriate program of education. Pursuant to Virginia Code Section 22-10.8(a), handicapped children are

1. Appellees are three handicapped children and their parents affected by the challenged statute and practice.

eligible for a tuition grant to attend a private school approved by the state Department of Education where no appropriate program is available in the public schools. In most cases these grants do not cover the full costs of the private schools. In fact, during 1975-76, parents were required to contribute an average of $2,760 for a non-residential school.

Appellees and the class they represent[2] are handicapped children or parents of handicapped children for whom no appropriate educational program is available in the public schools. Additionally, appellees lack the financial resources to contribute to the private school tuition not covered by the tuition grants. As such, the children appellees are totally denied an opportunity to obtain a program of appropriate education. In contrast, all non-handicapped children in Virginia receive a free appropriate education within the public school system. During school year 1975-1976, approximately 80,000 handicapped children also received such an education. In addition, there were 2,426 handicapped children who were able to enroll in private schools with the assistance of state tuition grants.

2. On April 28, 1976, the lower court declared two plaintiff classes consisting of (1) those handicapped children in Virginia without appropriate public school programs and unable to supplement the tuition grants available pursuant to Virginia Code Section 22-10.8(a) and (2) the parents of such children.

In an attempt to provide handicapped and poor children with an education, local welfare departments, with funds provided through the state Department of Welfare, will pay all or enough of the tuition not covered by the state grants to enable an affected handicapped child to enroll in an appropriate private school. However, such funds are available only if parents first give legal custody of the child to the welfare department. The practice of requiring parents to relinquish custody of their children in exchange for obtaining an education is not a common one nationally.

The three judge court below declared Virginia Code Section 22-10.8(a) unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment and enjoined appellant W.E. Campbell and the defendant members of the state Board of Education to

> "provide, or direct the provision of an appropriate private education to the plaintiffs and the class they represent, commensurate with the education available to the more affluent handicapped children pursuant to Section 22-10.8(a) of the Virginia Code of 1950 (as amended), for so long as no appropriate public education is available to them." J.S. App. 2.

The lower court also declared unconstitutional, as violative of the right to family integrity, guaranteed by the Ninth and Fourteenth Amendments, the practice of providing full funding for a private school placement upon the condition that parents surrender legal custody of their children to a local welfare department.[3] The director of the state Department of Welfare and the members of the state Board of Welfare were ordered to direct all local welfare departments to return to parents the custody of all members of the plaintiff class placed in state custody as a result of this practice.[4]

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3. Contrary to the assertion of appellants, J.S. at 7, appellees did not challenge upon state law grounds the welfare departments' practice of conditioning funding upon a relinquishment of custody. Rather, appellees charged that such violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794, the Social Security Act, 42 U.S.C. Section 625, the equal protection clause of the Fourteenth Amendment, as well as the family integrity right upon which the lower court based its decision.

4. Contrary to appellants' assertion, J.S. at 7, this relief did not merely incorporate the partial reform instituted by state welfare officials, which did not include any specific efforts to return custody of those children placed in state care pursuant to the unconstitutional relinquishment policy.

Since the court below issued its judgment, appellants have submitted to the district court a plan detailing the steps they would take to insure appellees equal educational opportunity. The adequacy of that plan is sub judice. Additionally, since the court issued its judgment, the U.S. Department of Health, Education and Welfare issued sweeping regulations pursuant to the Rehabilitation Act of 1973, 29 U.S.C. Section 794. 42 Federal Register 22676, et seq. Because of these regulations appellees have filed a motion which is also sub judice to amend that court's judgment so as to base relief upon Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794 rather than the Fourteenth Amendment.

POINT I

THE COURT HAS NO JURISDICTION TO CONSIDER AN APPEAL BY THE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA.

Appellants in this appeal are W.E. Campbell, the Virginia Superintendent of Instruction, and the Board of Education of the Commonwealth of Virginia. Jurisdictional Statement, p. 1. The Board of Education, however, was not a party to this case. Only the individual members of the Board were named as defendants. Moreover, since this case is an action brought pursuant to 42 U.S.C. Section 1983, the Board of Education, a state agency, presumably could not have been named as a defendant. Monroe v. Pape, 365 U.S. 167 (1961).

Accordingly, this Court has no jurisdiction to consider the purported appeal of the Board of Education.

POINT II

THE JUDGMENT BELOW IS CLEARLY CORRECT.

A. Virginia's Scheme Is Unconstitutional.

The decision of the court below, striking down Virginia Code Section 22-10.8(a) insofar as it discriminates against the plaintiff class, is so clearly correct that further review by this Court is unwarranted.

Although upholding a state's statutory system for financing public education which results in substantial interdistrict disparities in per-pupil expenditures, this Court in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) indicated the constitutional infirmities of a tuition grant system for public education nearly identical to that at issue here.

> "If elementary and secondary education were available by the state only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of 'poor' people--definable in terms of their inability to pay the prescribed sum--who would be absolutely

precluded from receiving an education. That case would present far more compelling set of circumstances for judicial assistance than the case before us today." Id. at 25, n. 60.

The instant case involves a class of handicapped children who must pay in order to receive the appropriate education provided to all other school children in Virginia. Like the poor children in the Rodriquez hypothetical, the plaintiff class here, by definition, cannot afford the supplemental payments required in addition to the state tuition grants. Without the means to make these payments, the children cannot be enrolled in the private schools available for their appropriate education. The district court found that since the children have no appropriate public programs available to them, they "sustain an absolute deprivation of a meaningful opportunity to enjoy the benefits of an appropriate education." J.S., App. 13.

This gross discrimination against those children who are handicapped and poor lacks any rational justification. The obvious purpose of the tuition grant statute is to provide an appropriate education to those handicapped children not accomodated within the public schools. But the effect of the statute is irrationally to exclude poor and middle income children from educational opportunity pro-

vided at state expense to the more affluent. The poor never receive any state tuition assistance since they are not enrolled in private schools. The affluent are thus the only recipients of the state's largess. As stated by the court below,

> "Such a result is not rationally related to either the state's interest in providing education to the handicapped or to its interest in preserving its financial resources, since the grant is fully available to those whose economic need is less, and unavailable as a practical matter to those whose economic need is greatest." J.S. App. 13.

This Court has repeatedly held that such a discriminatory exclusion from government benefits violated equal protection. See, Jimenez v. Weinberger, 417 U.S. 628 (1974); Department of Agriculture v. Moreno, 413 U.S. 528 (1973). Appellees "stand on an equal footing" with their more affluent counterparts in their need for an education, and to "deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws." Jimenez v. Weinberger, supra at 637. Moreover, state fiscal concerns cannot justify the exclusionary burden borne by these appellees alone. In James v. Strange, 407 U.S. 128 (1972), a unanimous court struck

down a state recoupment statute which denied indigent criminal defendants exemptions from execution given all other judgment debtors. While the court recognized the legitimate state interest in recouping the costs of court-appointed counsel, it held that "these interests are not thwarted by requiring more even treatment of indigent criminal defendants with other classes of debtors." Id. at 141. State fiscal concerns, therefore, "need not blight in such discriminatory fashion the hopes of indigents for sulf-sufficiency and self-respect." Id. at 141-142.

The judgment at issue here, like James v. Strange, merely requires appellants to provide "more even treatment" of appellees compared with the educational opportunity available to the affluent. The lower court only ordered appellants to insure that appellees and the class they represent receive "an appropriate private education... commensurate with the education available to the more affluent handicapped children pursuant to Section 22-10.8(a) of the Virginia Code of 1950 (as amended), for so long as no appropriate public education is available to them." J.S., App. 2.

This mandate is entirely consistent with cases holding that states are not generally required by equal protection to design social benefit programs in such a fashion as to fully meet the needs of all potential recipients. See, Dandridge v.

Williams, 397 U.S. 471 (1970); Jefferson v. Hackney, 406 U.S. 535 (1972); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937). Such cases are premised upon the availability of governmental services to all classes of recipients, including the indigent, although the services may not fully meet the social needs dealt with as to all eligible classes. In Dandridge v. Williams, supra, for example, the court sustained a system of welfare grants which failed to provide to large families the proportionate level of public assistance available to smaller families. But under the system at issue in Dandrige v. Williams, the larger families challenging the distribution of public funds could in fact obtain and utilize the grants available to them.

The instant case, however, presents a completely different situation, for the appellees here are totally excluded from receiving the tuition grants obtained by the affluent. Appellees must pay money out of their own pockets in order to utilize the grants and they lack the financial means to do so. The effect is to totally exclude them from the receipt of the services gained by the affluent. Jurisdictional Statement, App. 13. Such an exclusionary system of service financing--as opposed to one which has only a proportionately negative impact upon some recipients--is violative of equal protection guarantees under the established precedents of this Court where there is no rational

justification for the discriminatory treatment.[5] Jimenez v. Weinberger, supra; Department of Agriculture v. Moreno, supra; San Antonio Independent School District v. Rodriguez, supra at 25, n. 60.

The result in this case is consistent with every federal decision which concerns handicapped children. In fact, all of the cases dealing with the equal protection rights of handicapped children have agreed that their exclusion from educational benefits available to others would be unconstitutional. See, e.g., Frederick L. v. Thomas, 408 F.Supp. 832, 834-835 (E.D. Pa. 1976); In re G.H., 218 N.W.2d 441 (N. Dak. 1974); Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972); Harrison v. Mich-

5. Levy v. New York, 38 N.Y.2d 653, 382 N.Y.S.2d 13, 345 N.E.2d 556, appeal dismissed, ___ U.S. ___, 97 S.Ct. 39 (1976), Cuyahoga County Ass'n for Retarded Children v. Essex, 411 F.Supp. 46 (N.D. Ohio 1976) and New York Ass'n for Retarded Children v. Rockefeller, 357 F.Supp. 752 (E.D.N.Y. 1973), relied upon by appellants, involved no exclusion from educational opportunity and therefore inopposite. For example, in Levy v. New York, supra, the tuition grant system which was sustained required parents to contribute only such sums as they could afford, with the effect that no child was denied the opportunity to utilize the grants.

igan, 350 F.Supp. 846 (E.D. Mich. 1972). Cf., McMillan v. Board of Education, 430 F. 2d 1145 (2d Cir. 1970); Halderman v. Pittenger, 391 F.Supp. 872 (E.D. Pa. 1975); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F.Supp. 1257 (1971) and 343 F.Supp. 279 (E.D. Pa. 1972).

B. The Relief Ordered By the District Court Was Appropriate and Within Its Power.

Given this clear unconstitutional impact of Section 22-10.8(a), it was entirely within the district court's power to order the relief provided. As stated in Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1, 15 (1971) rehearing denied, 403 U.S. 912,

> "If school authorities fail in their affirmative obligations..., judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."

The district court's judgment was carefully limited to remedying only the discrimination found unconstitutional and "[a]n order of this kind is within the court's power if required to assure these petitioners that their constitutional rights will no longer

be denied them." Griffin v. County School Board, 377 U.S. 218, 233-234 (1964). See also, Milliken v. Bradley, ___ U.S. ___, 45 L.W. 4873 (dec. June 28, 1977).

Appellants' argument to the contrary borders on the frivilous. They have the clear authority, under state law, to undertake the obligation imposed upon them.[6] Virginia Code Section 22-10.4 (1976 Supp.) specifically directs the state Board of Education to "prepare and place in operation a program of special education designed to educate and train handicapped children." (Emphasis added.) See also, Virginia Code Sections 22-10.12 (1976 Supp.) 22-19, 22-21.2, 22-40 and 22-126.1.

The relief provided by the district court intrudes upon no federalism interests. Unlike Rizzo v. Goode, 423 U.S. 362 (1976), where administrative officials played no role in the sporatic acts of misconduct engaged in by individual police

6. Bradley v. School Board of City of Richmond, 462 F.2d 1058 (4th Cir. 1972), aff'd by equally divided court, 412 U.S. 92 (1973), relied upon by appellants, dealt only with appellants' authority in the area of general education, not that dealing with the handicapped. Moreover, it was decided before the enactment of the state legislation at issue here, which considerably broadened appellants' authority over the education of the handicapped.

officers, the appellants' own acts here result in the unconstitutional deprivations suffered by appellees, since they directly administer and regulate the state tuition grant system at issue. Given the clear unconstitutionality of appellants' own acts, the interests of our federal system command, rather than contravene, the necessity that their conduct be brought within constitutional norms. Swann v. Charlotte-Mecklenberg Board of Education, supra.

Appellants' argument that National League of Cities v. Usery, 426 U.S. 833 (1976), prohibits the relief provided is without merit for that case dealt only with Congress' power under the Commerce Clause to impose minimum wage requirements upon state governments. To equate Congress' Article I authority with that of a federal court, acting pursuant to inherent Article III authority and a statutory remedy enacted pursuant to Section 5 of the Fourteenth Amendment, is to ignore the basic federal structure separating governmental authority into distinct legislative, judicial and executive branches. This Court has never held that the Tenth Amendment restricts a federal court's authority to remedy unconstitutional conduct.

The Eleventh Amendment also constitutes no restriction upon the relief ordered. There is absolutely no authority holding that prospective relief necessary to curb unconstitutional conduct is barred by the Eleventh Amendment, even if there

is a consequential fiscal impact. On the contrary, since Ex Parte Young, 209 U.S. 123 (1908), this Court has never questioned on Eleventh Amendment grounds the federal judiciary's power to enjoin state officials from future unconstitutional acts. Edelman v. Jordan, 415 U.S. 651 (1974), held only that retroactive relief is beyond the authority of the federal courts if such imposes a liability upon a state's treasury. Prospective relief was not at issue in that case and the Court went to great lengths to distinguish its holding from the clear case law allowing similar prospective relief. Id. at 657-658, 664, and 666, n. 11. As this Court recently reaffirmed, federal courts are authorized "to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury." Milliken v. Bradley, supra, 45 L.W. at 4879.

POINT III

THIS CASE IS INAPPROPRIATE FOR REVIEW BECAUSE BASED UPON UNIQUE FACTS, THE JUDGMENT IS OF LIMITED DURATION AND RELIEF IS NOT FINAL.

The judgment below was not based solely upon the inadequacy of the educational funding scheme operated by these appellants. Also at issue was the relinquishment policy of state welfare officials which grew out of the discriminatory impact of Virginia Code Section 22-10.8(a). The court below

found that welfare officials would provide full funding for the private education unavailable to the appellee class under the challenged statute. But such was available only if parents agreed to give custody of their children to the state. The defendant state welfare officials in stipulations admitted that this practice was without rational justification:

> "The legal custody of a handicapped child should not normally be a relevant factor in the provision of special education services. The maintenance of stable parental relationships is an important factor for normal childhood development and this relationship should not normally be disrupted." Stipulations Between Plaintiffs and State Welfare Defendants, para. 9.

While this appeal does not challenge the lower court's determination that this relinquishment practice is unconstitutional, its judgment on this issue, and the facts upon which it was based, are inseparably connected to this appeal. Appellees' complaint had sought the relief at issue here, i.e. the provision of equal educational opportunity to poor, handicapped children, jointly from both appellants and the defendant welfare officials. Moreover, while these appellants did not operate the relinquishment policy of the welfare defendants, they were directly responsible

for it since the inadequacy of the tuition funding scheme they did operate forced its creation.

Given the blatant and admitted irrationality of requiring parents to give up custody of their children in order to obtain educational opportunity, it is extremely unlikely that this practice would be prevalent elsewhere. This appeal merely presents an episodic legal issue which should not recur again and which is, therefore, not of sufficient importance to merit review by this Court. Cf., Rice v. Sioux City Cemetery, 349 U.S. 70 (1955).

Moreover, any judgment rendered by this Court would have only limited impact, even for these appellants. Federal legislation requires that Virginia provide an entirely free appropriate education to the appellee class beginning in September, 1978. P.L. 94-142, Section 612(2)(B), 20 U.S.C. Section 1412(2)(B). Recent regulations promulgated by the U.S. Department of Health, Education and Welfare pursuant to the Rehabilitation Act of 1973, 29 U.S.C. Section 794 reinforce this obligation. 42 Federal Register 22676, et seq.

This legislation goes well beyond the relief ordered by the District Court, which allows appellants to exact parental contribution based upon ability to pay. Therefore, the judgment at issue will be effectively moot, beginning in September, 1978. Given the period of time likely to result

before this Court would render its decision. If jurisdiction is noted, this Court's judgment would, therefore, be largely of academic impact for the parties involved. Cf., Rice v. Sioux City Cemetery, supra.

The present posture of the case in the district court also militates against this Court's exercise of jurisdiction. The judgment of March 23, 1977 requires appellants to file a plan detailing the steps they would take to insure appellees equal educational opportunity. They have done so but the district court has not yet ruled on whether their submission is adequate to remedy the unconstitutional tuition system. Because several of appellants' points raised in this appeal deal only with the relief ordered, the district court's final ruling as to relief may materially alter the issues raised in this appeal.

Moreover, appellees have a motion pending in the district court to amend the judgment of March 23, 1977, so as to base relief upon Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794. The U.S. Department of Health, Education and Welfare recently promulgated regulations implementing this statute, which were not available to the district court when it issued its decision of March 23, 1977. 42 Federal Register 22676 (May 4, 1977). The district court's decision on the pending motion to amend its judgment may significantly affect the posture of the case by providing a non-constitutional

basis for the result obtained.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal herein should be dismissed or, alternatively, that the decree and order of the District Court should be affirmed.

Respectfully submitted,

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